

ORIGINAL

6 MAR 1981

Before the
Copyright Royalty Tribunal
Washington, D.C.

In the Matter of:

Compulsory License for Secondary)
Transmissions by Cable Systems;) CRT 80-3
Royalty Adjustment Proceeding)

OPPOSITION TO PETITION FOR
DECLARATORY RELIEF

The National Cable Television Association ("NCTA") hereby submits its opposition to the Petition for Declaratory Relief filed by the Copyright Owners in the above-captioned proceeding on February 23, 1981.

The Tribunal's final decision in this proceeding was published in the Federal Register on January 5, 1981. 46 Fed. Reg. 892. That decision increased the royalty rates established by Section 111(d)(2)(B) of the Copyright Act and the gross receipts limitations established by Section 111(d)(2)(C) and (D). The new rates and gross receipts limitations were to take effect on January 1, 1981, so as to apply to the first semi-annual payment period of 1981. However, appellate review of the Tribunal's decision was requested by NCTA and the Copyright Owners within the 30-day timeframe provided by Section 810 of the Copyright Act.

On February 23, seven weeks after the Tribunal's decision, the Copyright Owners filed the instant request for a declaratory

ruling. They are asking the Tribunal for two determinations: (1) that cable systems are obligated for payment of the higher royalty fees as of January 1, 1981; and (2) that interest must be paid by cable systems on amounts not remitted until court review is completed. This request is predicated on the Copyright Owners' reading of Section 809 of the Act to the effect that a timely appeal of a Tribunal order automatically stays compliance with that order pending completion of judicial review. Thus, the Copyright Owners argue, although cable systems can not be made to pay at the new higher royalty rates until judicial review is completed, the Tribunal should rule that cable systems are liable as of January 1, 1981, for the higher fees, and that if they end up having to pay those fees at a later date, the payments will be made plus interest.

At the outset, NCTA seriously questions whether the Tribunal can even attempt to address the issues put forth by the Copyright Owners. Since the filing of an appeal stays compliance with the Tribunal's order, the Tribunal may well be powerless to amplify or amend its order at this time. The Copyright Owners request comes seven weeks after the Tribunal published its decision, and six weeks after NCTA lodged its appeal from that decision. Questions of interpretation of Section 809 of the Act are more properly addressed to the court while the entire matter is within its jurisdiction, or to the Tribunal when the court has concluded its review. In short, the Copyright Owners are asking the Tribunal to rule on questions bearing on a matter which is not now within the Tribunal's jurisdiction.

Moreover, the questions presented by the Copyright Owners are not ripe for determination. Although the fee schedule adopted by the Tribunal may be affirmed, the Tribunal's decision may also be remanded on any one of a number bases. The questions raised by the Copyright Owners may therefore never have to be resolved. If they do have to be resolved, now is not the time. It will not make one dollar of difference if these questions are left for resolution when and if they become germane.

Beyond the issue of the appropriate time for the Tribunal to act, there is the more basic question of whether the Tribunal can ever decide these issues, particularly the issue of interest payments. The Tribunal is purely a creature of Congress, created by Chapter 8 of the Copyright Act, and circumscribed by the powers set out in that chapter. The Tribunal is given the two tasks of adjusting certain royalty rates and distributing certain royalty fees. The procedures and methods for carrying out these tasks are carefully set forth in a few statutory sections. No expansive powers or open-ended implementation language is to be found in Chapter 8. The Tribunal's powers are clear, precise and limited. NCTA questions whether it is within the purview of these powers for the Tribunal to issue an opinion on the effect of a pending appeal on one of its decisions. This is particularly so in the case of the Copyright Owners' request for an order calling for interest to be paid on fees not paid until after court review.

Even if the Tribunal can determine the effective date of an appealed adjustment decision, it has no power to order interest to be paid on royalty fees.

The Copyright Owners have been able to cite no authority for the power of the Tribunal to impose an interest obligation. The analogies cited are all inapposite. The equitable power of a District Court can in no way be equated with a government agency's power. In order for the Tribunal to be able to assess interest, some statutory authority must be found to exist. None does. The fact that Section 111(d)(3) directs the Copyright Office to invest undistributed fees in interest-bearing securities has no bearing on the Tribunal's authority.^{1/} Thus, irrespective of the alleged justice of the Copyright Owners' request, the Tribunal has no authority to issue such an order.

In footnote 7 of their pleading the Copyright Owners attempt to sound evenhanded by saying that if a cable system voluntarily pays at the new higher fees, and those fees are upset on review, then the cable system should get its overpayment back plus interest. Aside from the unlikelihood that many cable systems will put themselves in such a position, the Tribunal's authority to so act in those circumstances would be decidedly weak. But

^{1/} Indeed, the Copyright Office does not impose an interest obligation on cable systems which pay all or a portion of their semiannual fees after the due date.

CERTIFICATE OF SERVICE

I, Risa R. Powers, a secretary in the firm of Fleischman & Walsh, P.C., do hereby certify that I have caused to be mailed, postage prepaid, this 6th day of March, 1981, copies of the foregoing "Opposition to Petition for Declaratory Relief" to the following:

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this "concession" by the Copyright Owners points up a practical problem with its interest suggestion. If the new higher fee schedule is upheld on review, the Copyright Owners would have cable systems pay their accrued underpayment plus interest. However, some cable systems will have made an overpayment, i.e., those systems now paying on a per-DSE basis but who will revert to the generally lower-paying percent of revenues basis under the new higher gross receipts limitations. If underpayers have to pay interest, aren't overpayers entitled to collect interest. As noted above, however, the Tribunal's power to pay interest on overcollected fees has nowhere been established.

In sum, the Copyright Owners' request is inappropriate on a number of independent grounds and should therefore be dismissed or denied. It is directed to the wrong forum; it is premature; and, in any event, the Tribunal does not have the authority to do as requested.

WHEREFORE, the Petition for Declaratory Relief filed by the Copyright Owners on February 23, 1981, should be dismissed or denied, as appropriate.

Respectfully submitted,

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